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No. 90-1285

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT SHAVALIER,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the trial judge err in refusing to instruct the jury as to Petitioner's Requested Jury Instruction No. III?

II.

Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. IV?

III.

Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. II?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 3

REASONS WHY THE PETITION SHOULD BE DENIED 11

I. The trial judge properly refused to instruct the jury as to Petitioner's Requested Jury Instruction No. III, since the trial judge's jury charge correctly stated the applicable law and the substance of the requested instruction was contained in the charge, as given 11

II. This Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. IV because a state court's decision rests upon an adequate and independent state procedural ground . . . 27

III. This Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. II because the State court's decision rests upon an adequate and independent state procedural ground . . . 35

CONCLUSION 42

TABLE OF AUTHORITIES

Cases:

American Booksellers Ass'n, Inc. v. Randall, 332 Pa. Super 537, 481 A.2d 919 (Pa. Super. 1984) 34

Bailey v. Anderson, 326 U.S. 203, reh. den., 326 U.S. 691 (1945) . . 26

Beigay v. Traxler, et al., 790 F.2d 1088 (4th Cir. 1986) . . . 20, 32, 39, 40

Caldwell v. Mississippi, 472 U.S. 320 (1985) 31

Chander v. Florida, 449 U.S. 560, 570 (1981) 29

Chapman v. California, 386 U.S. 18 (1967) 39

Charleston Federal Sav. & Loan Assoc. v. Alderson, 324 U.S. 182, reh. den. 324 U.S. 888 (1945) . . 26

Com. v. Dane Entertainment Services, Inc. (No. 1), 23 Mass. App. Ct. 1017, 505 N.E.2d 892 (1987) . . . 33

Cupp v. Naughten, 414 U.S. 141 (1973) 21

Dixie Books, Inc. v. State, 147 Ga. App. 593, 249 S.E.2d 634 (1978) 34

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 30, 31, 36

Francis v. Franklin, 471 U.S. 307 (1985) 24

Ginsberg v. New York, 390 U.S. 629 (1968) 33

Gotlieb v. State, 406 A.2d 270 (Del. 1979) 34

Harris v. Reed, ___U.S.___, 109 S.Ct. 1039 (1989) . . 29, 31, 36

Hart Book Stores, Inc. v. Edminster, 612 F.2d 812, 833 (4th Cir. 1979) cert. denied, 447 U.S. 929 (1980) . . . 40

Henderson v. Kibbe, 431 U.S. 145 (1977) 21

Henry v. Mississippi, 379 U.S. 443, 446 (1964), reh. denied, 380 U.S. 926 (1965) 30

Hunter v. State, 271 S.C. 48, 244 S.E.2d 530 (1978) 29, 36

Michigan v. Long, 463 U.S. 1032 (1983) 30, 31, 36

Michigan v. Tyler, 436 U.S. 499 (1978) 30

Miller v. California, 413 U.S. 15 (1973) . . 20, 33, 39, 40

Mishkin v. New York, 383 U.S. 502 (1966) 33, 34

Murdock v. Memphis, 87 U.S. 590 (1875) 26

Odom v. County of Florence, 258 S.C. 480, 189 S.E.2d 293 (1972) 31

People v. Wiseman, 129 Mich. App. 258, 341 N.W.2d 494 (Mich. App. 1983) 34

Rose v. Clark, 478 U.S. 570 (1986) 39

Rosen v. United States, 161 U.S. 29 (1896) 33

Smith v. California, 361 U.S. 147 (1959) 29, 32, 33

State v. Barrett, 278 S.C. 92, 292 S.E.2d 590, cert. denied, 459 U.S. 1021 (1982) . . . 21, 39, 40

State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983) 11, 21, 23, 26, 36, 37

State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986) 30

State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980) 30

State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) 21

State v. Logan, 279 S.C. 345, 306 S.E.2d 622 (1983) 38

State v. Mitchell, 261 S.C. 452, 200 S.E.2d 448 (1973) 30

State v. Rabon, 275 S.C. 459, 272 S.E.2d 634, 636 (1980) . . 21, 37

State v. Robert D. Shavalier, Op. No. 90-MO-292 (S.C. Sup.Ct. filed Nov. 20, 1990) 3

State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977) 32, 38

State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) 38

State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) 30

State v. Summers, 692 S.W.2d 439 (Tenn. Cr. App. 1985) 33

State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549, 554 (1975) . . 32, 34

State v. Worthy, 239 S.C. 465, 123 S.E.2d 835 (1962) 38

United States Home Ins. Co. v. Dick, 281 U.S. 397 (1930) 26

United States v. Hamling, 418 U.S. 87, 104 (1974) . 22, 29, 33

United States v. Hansen, 701 F.2d 1215 (7th Cir. 1983) 21

United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983) . 21, 23, 26

United States v. Solomon, 686 F.2d 863 (11th Cir. 1982) 21, 23

Other Authorities:

28 U.S.C. § 1257(a) . i, 2, 27, 31, 35, 36

S.C. Code Ann. § 16-15-305 (Supp. 1990) . . 3, 9, 12, 13, 20, 29, 31, 32, 35, 37-39

South Carolina Supreme Court Rule 4, § 6 . . . . . 30, 36

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Opinion Below

The Memorandum Opinion of the South Carolina Supreme Court, dated November 20, 1990, is reproduced in Petitioner's Appendix 1 to Petition for Writ of Certiorari, at App. pp. 1a-2a.

Jurisdiction

The Memorandum Opinion of the South Carolina Supreme Court was filed on November 20, 1989. This Court's jurisdiction was

invoked by Petitioner pursuant to 28 U.S.C. § 1257(a). Respondent respectfully maintains, however, that Petitioner has not satisfied the burden of proof in establishing this Court's jurisdiction, with respect to Question II and Question III.

STATEMENT OF THE CASE

Petitioner, the owner of Big Time Video in North Charleston, South Carolina, was convicted of disseminating an obscene videotape, in violation of S.C. Code Ann. § 16-15-305 (Supp. 1990). His conviction arose out of the sale of a copy of "The Devil in Miss Jones" to an undercover officer. On direct appeal, the South Carolina Supreme Court issued a Memorandum Opinion, affirming Petitioner's conviction. State v. Robert D. Shavalier, Op. No. 90-MO-292 (S.C. Sup.Ct. filed Nov. 20, 1990).

The State's evidence revealed that Agent John Andrew Ramey, III, is a Special Agent employed by the South Carolina Alcoholic Beverage Control Commission. His primary duty is the enforcement of Title 61 of the South Carolina Code of Laws. His secondary function is to assist any and all law enforcement agencies in Charleston, Dorchester, and Berkeley Counties. On March

16, 1988, Agent Ramey was contacted by Detective Phillip Glenn, of the City of North Charleston Police Department's Vice Enforcement Unit. Detective Glenn asked Agent Ramey if he would go into Big Time Video, at 4813 Rivers Avenue in North Charleston,[1] and purchase a copy of a videotape entitled "The Devil in Miss Jones." (Tr. p. 21, line 9 - p. 22, line 21; p. 36, line 1 - p. 38, line 6). Agent Ramey arrived at Big Time Video around 8:55 p.m. Immediately to Agent Ramey's left as he walked into the establishment, he saw a small display case. The cash register sat upon this display case and the person running the establishment stood behind it. Inside of the display case, was an assortment of dildos, vibrators and

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[1]This address is apparently near the City of North Charleston Police Department. (Tr. p. 35, lines 17-20). It should be noted that all citations in the Brief in Opposition are to the transcript of Record filed in the South Carolina Supreme Court.

lubricants associated with the use of such devices. On one wall were at least one dozen more of such devices. The wall in front of Agent Ramey contained various magazines; in the center of the room was a display area (which had books, magazines and other items); and, on the wall to the right, were videotapes of various movies. A sign advertised that there were 250 tapes available, and Agent Ramey estimated there were probably that many in the store. There were two other doorways in the store. Each of these led to approximately six or more small video movie booths, where a customer could watch a movie for $.25. The lighting in these booths was very poor. Agent Ramey did not see any material in Big Time Video that was not sexually oriented. (Tr. p. 22, line 22 - p. 28, line 8; p. 28, lines 15-16; p. 29, lines 10-13; p. 33, lines 21-24).

After briefly walking through the store, Agent Ramey approached the man

running the store,[2] and expressed his interest in purchasing "The Devil in Miss Jones." The man pointed at the wall containing the videotapes. Agent Ramey searched for the tape, but was unable to locate it. He again asked the man for the tape. The man walked around the counter, removed the tape from the wall, and asked whether Agent Ramey wished to rent it. Agent Ramey replied that he wanted to purchase the tape and the man rang up a sale on his cash register. The total cost was $73.45 (approximately $3.50 of which went to State sales tax). The man refused, however, to give a receipt to Agent Ramey and assured Agent Ramey that he would take care of any problems with the tape, should they arise. (Tr. p. 22, line 24 - p. 23, line 3; p. 27, lines 6-11; p. 28, line 12 - p. 30, line 7;

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[2]The man was described as a white male, in his late forties or early fifties. He was approximately 5'7" to 5'9" tall, and weighed between 200 and 230 pounds.

p. 33, lines 18-24).

It was stipulated that the telephone billing for Big Time Video went to Petitioner, at the store's address. Likewise, both the 1987 and 1988 business licenses for Big Time Video listed Petitioner as the owner thereof. (See State's Exhibits 26, 27 and 28). Also, the individual South Carolina income tax return (State's Exhibit 29) filed for Petitioner and his wife listed the business as Petitioner's. (Tr. p. 42, line 8 - p. 44, line 4).

Both the videotape (State's Exhibit 31) and the box in which it was originally packaged were introduced at trial. The videotape of "The Devil in Miss Jones" was played in its entirety for the jury. (Tr. p. 30, line 12 - p. 32, line 9; p. 44, lines 15-16).

The box (State's Exhibit 30) contains still pornographic photographs taken from

the movie, as well as advertising indicative of the movie's content. The movie "The Devil in Miss Jones" begins with the principal actress, a virgin, committing suicide. When later granted a momentary reprieve from Hell, the principal actress engages in various forms of vaginal, oral and anal intercourse, with one or more partners. For example, there is one scene in the movie which involves two men and this actress. In that scene, the actress engages in vaginal and anal intercourse, simultaneously. In another scene she appears with another female, as well as a male. There is yet another scene in which the principal actress simulates fellatio on a banana, after she has inserted the banana into her vagina. In the same scene, she allows a snake to crawl over her body. Then, she sticks the head of the snake into her mouth. In the very next scene, the actress states "...it's just that for the

first time in my life,...or for the first time, I've found contentment."

Petitioner offered the expert testimony of Dr. Clay Perry Drummond, a clinical psychologist who specializes in "Behavioral Medicine, Sex Therapy and Pain Management." It was Dr. Drummond's opinion, based upon a viewing of "The Devil in Miss Jones" and a study of S.C. Code Ann. § 16-15-305 (Supp. 1990) that the movie does not appeal to the "prurient interest" of the average person. (State's Exhibit 49, line 25 - p. 52, line 22).

On cross-examination, Dr. Drummond opined that it could appeal to a normal, healthy interest in sex for a woman to scream "Hurt me! Hurt me!" over and over again.[3] Dr. Drummond also stated that lesbianism appeals to a normal and healthy

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[3]Respondent would note that the principal actress in the movie is engaging in anal intercourse at the time she is screaming this. (State's Exhibit 31).

interest in sex. Finally, although he was hesitant to answer the question at first, Dr. Drummond stated that it appealed, if at all, to a normal, healthy interest in sex for a woman to remove a device from her anus and place it in her mouth.[4] (Tr. p. 53, line 1 - p. 55, line 4).

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[4]Dr. Drummond gave a similar response with respect to the actress' sticking the head of a live snake into her mouth. (Tr. p. 56, line 15 - p. 57, line 9).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The trial judge properly refused to instruct the jury as to Petitioner's Requested Jury Instruction No. III, since the trial judge's jury charge correctly stated the applicable law and the substance of the requested instruction was contained in the charge, as given.

Petitioner initially claims the trial judge's refusal to instruct the jury as to his Requested Jury Instruction No. III (see Appendix to Petition at p. 7a) denied him due process. Citing State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983), the South Carolina Supreme Court affirmed Petitioner's claim on direct appeal. Because the substance of the requested instruction was contained in the jury instruction, as given by the trial judge, and because the trial judge's instruction adequately and correctly stated the applicable law, this Court should

not grant the Petition.

The trial judge refused to charge the jury, verbatim, in accordance with Petitioner's requested jury instruction, since he believed that the charge which he was going to give the jury adequately covered Petitioner's requests. (Tr. p. 58, lines 1-15). Thereafter, the trial judge charged the jury. Before the trial judge instructed the jury in regard to S.C. Code Ann. § 16-15-305 (Supp. 1990), he charged the jurors with respect to Petitioner's presumption of innocence and the fact the State had the burden of proving Petitioner guilty beyond a reasonable doubt. He also instructed the jury that Petitioner was entitled to any reasonable doubt arising out of the whole case, or any defenses that Petitioner may have presented; and, if there was such a reasonable doubt, the jury must give such a reasonable doubt to Petitioner. Under such circumstances, the jury would

have the duty to acquit Petitioner. (Tr. p. 58, line 23 - p. 62, line 18).

Subsequently, the trial judge instructed the jury on the South Carolina law relating to the dissemination of obscenity. In so doing, he read from § 16-15-305, verbatim. Specifically, the trial judge charged the jurors that:

> Now, ladies and gentlemen, the defendant in this case, of course, has been charged in the indictment, which you will have in the jury room, with the crime of dissemination of obscene material. And, of course, our Legislature has saw fit (sic) to pass a statutory law in regard and regarding the dissemination of obscene material in this state.
>
> Section 16-15-305 states that: It is unlawful for any person knowingly to disseminate obscenity. A person disseminates obscenity within the meaning of the article if he:

[(A)](1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or description of the obscene.

(2) Presents or directs an obscene play, dance, or other performance, or participates directly in that portion thereof which makes it obscene.

(3) Publishes, exhibits or otherwise makes available anything obscene to any group or individual, or

(4) Exhibits, presents, rents, sells, delivers or provides or offers or agrees to exhibit, present, rent or to provide any motion picture, film, film strip or projection slide, or sound recording, sound tape or sound track, video tapes and recordings, or any matter or material of whatsoever form which is a representation, description, performance or publication of the

obscene.

[(B)] For the purpose of this article any material is obscene if,

(1) For the average person, applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct, specifically defined by Subsection (c) of this section--which I will get to in a minute or two.

(2) The average person, applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex.

(3) To a reasonable person the material, taken as a whole, lacks serious literary, artistic, political or scientific value, and

(4) The material, as used, is not otherwise protected or privileged under the Constitution of the United States or of this state.

[(C)] As used in this article,

(1) Sexual conduct means

(a) Vaginal, anal or oral intercourse, whether actual or simulated, normal or perverted, whether between human beings, animals or a combination thereof.

(b) Masturbation, excretory functions of a lewd examination--or exhibition--vulva or female breast nipples, including male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernible turgid state.

(c) An act or condition that depicts actual or simulated bestiality, sadomasochistic abuse, meaning flagellation or torture upon a person who is nude or clad in undergarments or in a costume which reveals the pubic hair, anus, vulva, genitals or female breast nipples or the condition of being fettered, bound or otherwise physically

restrained on the part of the one so clothed.

(d) An act or condition that depicts actual or simulated touching, caressing or fondling of or other similar physical contact, whether covered or exposed genitals, pubic or anal regions or female breast nipples, whether alone or between humans, animals, or a human and an animal, of the same or opposite sex, in an actual or--in an act of actual or apparent sexual stimulation or gratification; or

(e) An act or condition that depicts the insertion of any part of the person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done in part as a recognized medical procedure.

(2) Patently offensive means obviously and clearly distinguishable, objectionable, repugnant, displeasing, distasteful or obnoxious to contemporary standards of

decency and the propriety within the community.

(3) Prurient interest means a shameful or morbid interest in nudity, sex or excretion, and is reflective of an arousal of lewd, lascivious desires and thoughts.

(4) Person means any individual, corporation, partnership, association, firm, club or other legal or commercial entity.

(5) Knowingly means having general knowledge of the content of the subject material or performance, of failing after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance.

[(D)] Obscenity must be judged with reference to ordinary adults, except that it must be judged with reference to children or other especially susceptible audiences or clearly

defined deviant sexual groups, if it appears from the character of the material or the circumstances of its dissemination to be-- excuse me. I want to make a note here. If it appears from the character of the material or directed to children or such audiences or groups.

[(E)] As used in this article, community standards used in determining prurient appeal and patent offensiveness are the standards of the area from which the jury is drawn.

[(F)] It is unlawful for any person knowingly to create, buy, procure or possess obscene material with the purpose and intent of disseminating it.

[(G)] It is unlawful for a person to advertise or otherwise promote the sale of material represented or held out by them as obscene.

I charge you further that obscene material, of course, disseminated, procured or promoted in violation of this section is also contraband

> and may be seized by the appropriate law enforcement authorities.
>
> Now, ladies and gentlemen, that is the statutory law, of course, of this state. And, of course, I have charged you that law.

(Tr. p. 67, line 19 - p. 72, line 23). Also, when the jury requested supplemental instructions on two occasions, the trial judge re-charged the jurors on the definition of "prurient interest" (Tr. p. 96, lines 18-25) and the three-prong test of Miller v. California, 413 U.S. 15 (1973) as set forth in § 16-15-305(B). (Tr. p. 100, line 11 - p. 101, line 10).[5]

It is well settled that a state has the authority to regulate obscene materials because such materials are outside the scope of protection afforded by the First Amendment. Miller v. California, supra; Beigay v. Traxler, et al., 790 F.2d 1088

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[5]The trial judge's jury instructions are also reprinted in the Appendix to Petitioner's Petition for Writ of Certiorari. See App.3 at pp. 10a-29a.

(4th Cir. 1986); State v. Barrett, 278 S.C. 92, 292 S.E.2d 590, cert. denied, 459 U.S. 1021 (1982).

Likewise, it is generally held that "where a requested charge is fully and fairly covered by the trial judge's general charge, refusal of a requested instruction is not error." State v. Barwick, supra. See also Henderson v. Kibbe, 431 U.S. 145 (1977); United States v. Hansen, 701 F.2d 1215 (7th Cir. 1983); United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); United States v. Solomon, 686 F.2d 863 (11th Cir. 1982); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) (Gregory, C.J., dissenting). Further, there is no requirement that any specific language be charged. It is sufficient to charge the substance of the law in plain and clear terms. Cupp v. Naughten, 414 U.S. 141 (1973); State v. Rabon, 275 S.C. 459, 272

S.E.2d 634, 636 (1980).

The request-to-charge at issue would have required the jury to find Petitioner not guilty if the jurors could not "determine from the evidence what the standards of Charleston, South Carolina are in regard to explicit sexual material...." (Tr. p. 109, App. 3 at p. 7a). Because Respondent is not required to present evidence of what contemporary community standards are [see United States v. Hamling, 418 U.S. 87, 104 (1974)], Petitioner claims that in the absence of the requested instruction, the charge may have shifted the burden of proof to Petitioner, as to what the contemporary community standards are. Respondent disagrees and submits that this argument ignores the charge given by the trial judge.

Assuming without conceding that Petitioner's requested Jury Instruction No. III is a proper statement of both

constitutional and South Carolina law, there still was no error. The trial judge's charge covered the substance of Petitioner's request-to-charge. Therefore, it was not error for the trial judge to deny Petitioner's requested instruction. United States v. Skinner, supra; United States v. Solomon, supra; State v. Barwick, supra.[6] In particular, the trial judge instructed the jury that the State bore the burden of proof as to each element of the offense charged and that the State had to prove such element beyond a reasonable doubt. He also instructed the jury on the presumption of innocence (referring to it as a "robe of righteousness") and the fact a defendant is

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[6]Despite Petitioner's claim to the contrary, there was no evidence introduced at trial which would shed any light on what the appropriate community standards should be in Petitioner's case. Rather, Dr. Drummond merely testified that "The Devil in Miss Jones" did not appeal to a prurient interest in sex when measured by these standards. (Tr. p. 51, line 12 - p. 57, line 9).

never required to prove himself innocent. (Tr. p. 58, line 23 - p. 62, line 1).

Next, the trial judge instructed the jury that:

> I charge you that the defendant is entitled to any reasonable doubt arising out of the whole case, or arising out of any defenses that may have been set up by him.
>
> If upon the whole case you have a reasonable doubt as to the guilt of the defendant, you must give him the benefit of that doubt; and under those circumstances he would be entitled to an acquittal at your hands.

(Tr. p. 62, lines 1-9). (Emphasis added).

Notwithstanding Petitioner's assertions to the contrary, Respondent submits the trial judge's instructions did not result in unconstitutional burden shifting. It is generally presumed that jurors listen to and understand jury instructions given by a trial judge. Francis v. Franklin, 471 U.S.

307 (1985). Nor would a reasonable juror, hearing the trial judge's charge in this case, conclude that Petitioner had the burden of proof of any element of the offense charged. To the contrary, the only reasonable understanding of the jury instruction is that the State had the burden to prove each element of the offense charged and that Petitioner had no burden of proof, whatsoever. Moreover, if the juror(s) had a reasonable doubt arising out of the whole of the case, or any defense(s) presented, that doubt had to be resolved in Petitioner's favor and the jury had to acquit him.

As to Petitioner's assertion that there was no framework provided for defense counsel's closing argument (see Petition at p. 14), Respondent submits that argument is not properly before this Court because Petitioner did not present the same argument to the South Carolina Supreme Court. This Court has consistently held that it does not

have appellate jurisdiction over a state supreme court as to issues which were not presented to that court. See, e.g., Bailey v. Anderson, 326 U.S. 203, reh. den., 326 U.S. 691 (1945); Charleston Federal Sav. & Loan Assoc. v. Alderson, 324 U.S. 182, reh. den. 324 U.S. 888 (1945); United States Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Murdock v. Memphis, 87 U.S. 590 (1875).

Therefore, the Petition for Writ of Certiorari should not be granted. Although the trial judge did not grant the requested jury instruction, he did cover the substance of the requested charge in his jury instructions. Further, the charge, as given, fully and correctly stated both South Carolina law, as well as the applicable federal constitutional law. Thus, there was no error. See United States v. Skinner, supra; State v. Barwick, supra.

II.

This Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. IV[7] because a state court's decision rests upon an adequate and independent state procedural ground.

Next, Petitioner claims the trial judge erred because he refused Petitioner's Requested Jury Instruction No V because, he claims, the trial judge's instruction as to the necessary scienter requirement violates the First and Fourteenth Amendments. Respondent submits this Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to entertain the constitutional challenge since the state supreme court's decision on this issue rests upon an

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[7]In the Petition, Petitioner erroneously refers to this as Requested Jury Instruction No. V, but it is, in fact, No. IV (See App. 3 at p. 8a.

adequate and independent state procedural ground. Furthermore, to the extent this Court finds that it does have appellate jurisdiction, Respondent submits there was not error. Rather, the trial judge's instructions correctly stated South Carolina law, and the relevant principles of federal constitutional law.

> The circuit court erred in refusing to charge defendant's Request to Charge No. 4 to wit:
>
> > One of the essential elements the prosecution must prove beyond a reasonable doubt is the element of <u>scienter</u> or knowledge; that is, at the time of the alleged offense, the Defendant had knowledge of the character of the charged materials. If you find that the prosecution has not proven beyond a reasonable doubt that, at the time of the alleged offense, the Defendant knew the character of the charged materials, then you must find the Defendant not guilty.

> Smith v. California, 361 U.S. 147 (1959); Hamling v. United States, 418 U.S. 87 (1974); § 16-15-305 of the South Carolina Code of Laws (1976) as amended.
>
> This was error because the requested instruction contained an accurate proposition of law, applicable to the facts of the case, not otherwise covered in his Honor's charge.

(Tr. p. 115).

In its Memorandum Opinion, the South Carolina Supreme Court affirmed this Exception, citing Hunter v. State, 271 S.C. 48, 244 S.E.2d 530 (1978) noting parenthetically that "arguments in brief which are not supported by exception are not properly before the Court." (App. 1, at pp. 1a-2a). The State submits this holding is a plain statement of a non-federal, state procedural bar. See Harris v. Reed, ___U.S.___, 109 S.Ct. 1039 (1989).

This Court has no supervisory jurisdiction over state courts. Chander v. Florida, 449 U.S. 560, 570 (1981). Therefore, the Court will decline to review

state court decisions which rest upon independent and adequate state grounds. Id. See also, Michigan v. Long, 463 U.S. 1032 (1983); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Henry v. Mississippi, 379 U.S. 443, 446 (1964), reh. denied, 380 U.S. 926 (1965). In Michigan v. Tyler, 436 U.S. 499 (1978), the Court cited Henry v. Mississippi, supra, and stated "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court...." Id. at 512, n.7.

The State procedural bar at issue was formerly codified in South Carolina Supreme Court Rule 4, § 6. Further, it has been applied, consistently, in non-capital cases. See, e.g., State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986); State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980); State v. Mitchell, 261 S.C. 452, 200 S.E.2d

448 (1973); Odom v. County of Florence, 258 S.C. 480, 189 S.E.2d 293 (1972). Nor is the plain statement of the state procedural bar unclear in any way. Contra Caldwell v. Mississippi, 472 U.S. 320 (1985).

Therefore, the State submits this Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) as to Petitioner's Question II, since the state court's decision relied upon an independent and adequate state ground, which was plainly stated in the opinion. Harris v. Reed, supra; Michigan v. Long, supra; Fox Film Corp. v. Muller, supra.

Moreover, even assuming arguendo this Court finds that it does have appellate jurisdiction, the State submits there was no error. The definition of "knowingly" found in § 16-15-305(C)(3) is constitutional. Also, Petitioner's request to charge did not accurately state South Carolina law.

Both the South Carolina Supreme Court and the Fourth Circuit Court of Appeals have

upheld the constitutionality of this definition of "knowingly." In State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549, 554 (1975), the court rejected an identical argument to that presented by Petitioner and held that the definition of "knowingly" in § 16-15-305(C)(3) "meets the constitutional requirement of scienter as a prerequisite to prosecutor." Similarly, the Fourth Circuit Court of Appeals upheld the constitutionality of this definition in Beigay v. Traxler, supra. Therefore, to the extent that Petitioner's request-to-charge did not follow the definition of "knowingly" found in § 16-15-305(C)(5), it was not a proper statement of South Carolina law, and there was no duty to charge it. State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977).

Nor is a different standard of intent required by Smith v. California, 361 U.S. 147 (1959) or any other decision of this

Court. This Court in Smith merely held that a state may not constitutionally eliminate a scienter requirement altogether. Id. at 153. See also Hamling v. United States, 418 U.S. 87, 121-125 (1974); Rosen v. United States, 161 U.S. 29 (1896). Yet, all that is constitutionally required is that a defendant be, in some manner, aware of the character of the material involved. See Ginsberg v. New York, 390 U.S. 629 (1968); Com. v. Dane Entertainment Services, Inc. (No. 1), 23 Mass. App. Ct. 1017, 505 N.E.2d 892 (1987); Mishkin v. New York, 383 U.S. 502 (1966); Rosen v. United States, supra. See also Hamling v. United States, supra.

Under Miller, states are thus free to pass obscenity statutes which vary greatly in the necessary scienter requirement. See e.g., Mishkin v. New York, supra (in some manner aware of character); Com. v. Dane Entertainment Services, Inc., supra (general awareness of character of material; State v.

Summers, 692 S.W.2d 439 (Tenn. Cr. App. 1985) (defendant had actual or constructive knowledge of contacts). See also, e.g., American Booksellers Ass'n, Inc. v. Randall, 332 Pa. Super 537, 481 A.2d 919 (Pa. Super. 1984) (reasonably should have known); People v. Wiseman, 129 Mich. App. 258, 341 N.W.2d 494 (Mich. App. 1983); Gotlieb v. State, 406 A.2d 270 (Del. 1979); Dixie Books, Inc. v. State, 147 Ga. App. 593, 249 S.E.2d 634 (1978).

Therefore, even assuming arguendo this Court finds that it does have appellate jurisdiction, the South Carolina definition of "knowingly" is constitutional, State v. Thompkins, supra. See also Mishkin v. New York, supra, and the trial judge's instructions were proper. Thus, this Court should deny the Petition.

III.

This Court lacks appellate jurisdiction under 28 U.S.C. § 1257(a) to determine whether the trial judge erred by refusing Petitioner's Requested Jury Instruction No. II because the State court's decision rests upon an adequate and independent state procedural ground.

Finally, Petitioner claims that the trial judge erred by instructing the jury, verbatim from § 16-15-305. He asserts this charge violated the First and Fourteenth Amendments to the United States Constitution since it permitted the jury to determine the effect of the allegedly obscene material upon an "ordinary" rather than an "average" member of the community. Petitioner also maintains that it was error to deny his Requested Jury Instruction No. II.

Initially, the State submits, for the reasons advanced in Question II, that this Court lacks appellate jurisdiction under 28

U.S.C. § 1257(a). In affirming Petitioner's conviction, the South Carolina Supreme Court clearly relied upon the procedural bar in Rule 4, § 6, and State v. Hunter, supra. While the state court did cite a case (State v. Barwick, supra) indicating the issue was without merit, this does not affect the independent nature of the procedural bar. Fox Film Corp. v. Muller, supra; Harris v. Reed, ___ U.S. ___, 109 S.Ct. 11044 n. 10. Thus, this is an adequate and independent state law ground and this Court lacks appellate jurisdiction. Id. Michigan v. Long, supra.

Furthermore, even assuming for purposes of argument that this Court finds it has appellate jurisdiction, the State submits there was no error, and the Petition should be denied because the trial judge's instructions correctly stated the applicable law. Also, the substance of the request-to-charge is contained in the trial judge's

jury instructions, as given.

A review of Petitioner's request-to-charge shows that the charge, as given, substantially covers the material in Petitioner's Request Jury Instruction No. II. (Compare Tr. p. 67, line 19 - p. 72, line 23; p. 96, lines 18-25; p. 100, line 11 - p. 101, line 10; with (Tr. pp. 107-109; Tr. pp. 111-114). See also § 16-15-305(B), (C), (D) and (E). Because the trial judge's instructions covered the substance of Petitioner's requested charge, his refusal to charge the jury pursuant to this request-to-charge was not error. State v. Barwick, supra; State v. Rabon, supra.

Before charging the jury, the trial judge informed both counsel for the State and defense counsel that he planned to charge § 16-15-305 in its entirety. Petitioner did not raise any objection at this time. Instead, he waited until the trial judge had completed his jury

instructions. (Tr. p. 58, lines 1-15; p. 76, line 25 - p. 83, line 4). To give the requested instruction at this point would not have served any purpose other than to needlessly confuse the jury, particularly since the substance of Petitioner's request-to-charge was contained in the trial judge's instructions. See State v. Simmons, supra, (trial judge not required to give requested jury instruction that is misleading or confusing). Because Petitioner's own conduct contributed to any alleged error which may have resulted, he could not complain on direct appeal. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Logan, 279 S.C. 345, 306 S.E.2d 622 (1983); State v. Worthy, 239 S.C. 465, 123 S.E.2d 835 (1962).

Petitioner claims that parts of § 16-15-305 were simply inapplicable and, therefore, they may have misled or confused the jury.

Respondent submits that any irrelevant portion of the statute which might have been charged was mere surplusage. Thus, the inclusion of this language in the trial judge's jury instructions was harmless error, because it was non-prejudicial. To the extent that there was no such evidence, the jury could simply disregard this portion of the trial judge's jury charge. The contested language is, therefore, harmless surplusage. As such, its inclusion constituted harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); Rose v. Clark, 478 U.S. 570 (1986).

Petitioner also attacks the use of the word "ordinary" person in § 16-15-305(D). This claim, which was rejected by the Fourth Circuit Court of Appeals in Beigay v. Traxler, supra, is simply without merit. As noted by the court in State v. Barrett, the Miller court stated:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.

278 S.C. 92, ____, 292 SE.2d 590, 591, cert. denied, 459 U.S. 1021 (1982). Miller simply does not require the type of precision Appellant demands. Rather, as noted by the Fourth Circuit Court of Appeals, "unavoidable imprecision is not fatal and celestial precision is not necessary." Hart Book Stores, Inc. v. Edminster, 612 F.2d 812, 833 (4th Cir. 1979) cert. denied, 447 U.S. 929 (1980), quoted in Beigay v. Traxler, 790 F.2d at 1093. See also State v. Barrett, supra.

Therefore, this Court should deny the Petition for Writ of Certiorari. Even assuming this Court has appellate jurisdiction, there was no error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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